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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

71-378

NO._____

KENNETH G. FLICKINGER, Registrar of Contractors of the State of Arizona,

Petitioner,

vs.

ELECTRIC CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

KENNETH G. FLICKINGER, Registrar of Contractors of the State of Arizona,

Petitioner,

vs.

ELECTRIC CONSTRUCTION CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Kenneth G. Flickinger, Registrar of Contractors of the State of Arizona, petitions for a writ of certiorari to review the judgment of the Supreme Court of Arizona entered in this case on May 27, 1971, rehearing denied, June 22, 1971.

Opinions Below

The opinion of the Court of Appeals of Arizona (Appendix B to this petition) is reported at 12 Ariz. App. 500, 472 P.2d 111 (1970). The opinion of the Supreme Court of Arizona (Appendix C to this petition) is reported at ..... Ariz. ....., 485 P.2d 547 (1971).

Jurisdiction

This is an action for an injunction instituted by the Registrar

of Contractors of the State of Arizona to prevent work on a federal project by subcontractors who were not licensed under Arizona law. The complaint was filed September 18, 1969. The trial court decided for the State and entered an injunction on March 17, 1970, with Findings of Fact and Conclusions of Law attached hereto as Appendix A. The Court of Appeals of Arizona affirmed with an opinion, Appendix B. The Supreme Court of Arizona reversed, with an opinion, Appendix C, on May 27, 1971; and a timely motion for rehearing was denied on June 22, 1971, Appendix D. This Court has jurisdiction under 28 U.S.C. § 1257(3).

Question Presented

Does the Constitution of the United States or any federal statute or regulation invalidate the contractor licensing laws of the State of Arizona as applied to a subcontractor doing work on a federal project in the State of Arizona?

Constitutional Provisions, Statutes and Regulations Involved

The relevant constitutional provision, statutes and regulation involved are as follows:

1. U. S. CONST. art. VI:

". . . .

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

". . . ."

2. 10 U.S.C. § 2305(c):

"(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors

considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest."

3. 32 C.F.R. § 1.906(b):

"Notwithstanding the general responsibility of a prospective contractor to demonstrate the responsibility of his prospective subcontractors, it may be in the Government's best interest to make a direct determination of the responsibility of one or more prospective subcontractors prior to award of the prime contract. Examples of when this may be particularly suitable are the procurements of (1) medical items, (2) supplies or services which are so urgently needed that it is necessary for the Government to go beyond the normal process in determining contractor responsibility, and (3) supplies or services, a substantial portion of which will be subcontracted. The determination of responsibility of a proposed subcontractor by the Government shall be based on the same factors as are applicable in a determination of responsibility of a prospective prime contractor."

4. A.R.S. § 32-1151:

"Engaging in contracting without license prohibited

"It is unlawful for a person, firm, partnership, corporation, association or other organization, or a combination of any of them, to engage in the business, act or offer to act in the capacity, or purport to have the capacity of contractor without having a license therefor as provided in this chapter, unless the person, firm, partnership, corporation, association or other organization is exempt as provided in this chapter. Evidence of securing a permit from a governmental agency or the employment of a person on a construction project shall be accepted in any court as prima facie evidence of existence of a contract."

Statement of the Case

Petitioner, the Registrar of Contractors of the State of Arizona, is the officer charged with the duty of enforcing the contracting licensing laws of the State of Arizona. The respondent, Electric Construction Co., Inc. (hereafter "Electric Construction"), was an electrical subcontractor under a general contractor named Forsberg & Gregory on several projects at the Davis-Monthan Air

Force Base near Tucson, Arizona. Under Arizona law, contracting in the state without a license is prohibited (A.R.S. § 32-1151). Electric Construction is not licensed in the State of Arizona, and had made no effort to obtain a license at the time this suit was brought.

The Registrar of Contractors therefore brought an action under the appropriate Arizona statute to enjoin Electric Construction and certain other similar contractors from continuing work. The essential defense was that subcontractors on federal construction projects did not have to be licensed by the State.

The facts of the case are not disputed and were set out with unusual completeness by the trial court in its Findings of Fact, Appendix A hereto, from which the following is taken:

A. *Description of the Base and the Work Involved.*

The Davis-Monthan Air Force Base, an area of some 11,200 acres, is contiguous to Tucson, Arizona. This case involves the construction of five buildings on it. Some of the land is leased from the State and some has been federally acquired, but there is no claim of federal enclave status for any of the land involved here.

The Base has a resident population of approximately 2,000 and a working population of 10,000. The Base has 550 homes, service facilities, recreation facilities and other facilities to serve its population. In addition, of course, there are runways, hangars, control towers and other structures common to airports. The Base may be roughly but fairly analogized to a small suburban town adjacent to Tucson.

The Sheriff of the county in which the Base is situated has regularly enforced and applied both the civil and the criminal laws of the State of Arizona on the Base. This includes the service and enforcement of warrants of arrest and service of civil process as well. Working in conjunction with special Base police, he investigates crimes and maintains order with the consent and cooperation of Base authorities.

The case involves construction of two dormitories, including all the plumbing, electrical, and other work necessary; certain small aircraft maintenance docks; and three other structures. The general contractor is Forsberg & Gregory and the Government's contract with it is the only contract it has in this case. Forsberg & Gregory entered into subcontracts with a large number of subs for plumbing, electrical, roofing, and all other types of work, with Electric Construction receiving the electrical subcontract. The Government did not review the subcontractors as a condition of the award of the contract to Forsberg & Gregory, nor did the Government deal directly with the subcontractors. Rather, it took up any matters relating to their work with the general contractor. The work in which Electric Construction was engaged is similar to that which might be found in similar construction in any of the larger cities or towns of Arizona, particularly around airports, universities or large housing developments.

B. *The State's Interest and the Role of the Registrar.*

We continue with the unchallenged facts as found by the trial court: all of the structures involved use City of Tucson utilities, including electrical sources. The structures connect with and are a general part of the same system which serves all of the inhabitants of the Tucson area. The people of that area have a legitimate concern with construction on the Base.

The Registrar of Contractors enforces the contractor licensing laws of the State of Arizona. The office determines the qualifications of contractors and licenses all units of the construction industry in Arizona. There are more than 7,000 licenses, including all types of general and subcontractors. The system in no way discriminates against out-of-state contractors or in favor of local contractors. Any qualified applicant can obtain a license within a short period of time.

The function of the Registrar's office is to protect the public of the State of Arizona. It serves this function by administering examinations to establish the qualifications of contractors, by giv-

ing a place at which complaints can be received and processed, and by establishing an address and consent to service of process under which licensees can be reached if there are claims against them. The office does not originate complaints or inspections, but if the Corps of Engineers desired to file a complaint against any contractor, it could do so. The principal relation of the office to a subcontractor on a federal project, like the respondent herein, would probably arise in case of complaints by suppliers or employees of the respondent.

The trial court expressly found that application of the Arizona licensing laws would not burden or in any way handicap or hinder Government construction, at least as to the work of the type here involved, and will serve a substantial public interest for the people of Arizona.

C. *The Proceedings Below.*

The trial court found that subcontractors on federal projects in Arizona were subject to the licensing laws of the State and gave appropriate relief. The State Court of Appeals affirmed, and the State Supreme Court reversed. The prime problem in the case at all stages was the weight to be given to *Leslie Miller, Inc. v. State of Arkansas,* 352 U.S. 187, 77 S. Ct. 257, 1 L. Ed. 2d 231 (1956), which held general contractors on federal work immune from state regulation. The Arizona Court of Appeals held that *Miller* was inapplicable to subcontractors because there was no conflict between Arizona's licensing requirements as applied to subcontractors and federal statutes and regulations. The Arizona Supreme Court, while recognizing that the federal government had made no subcontractor selection here (as it substantially never does), held that the mere possibility of a conflict between a government determination and state licensing requirements was sufficient to bar application of the state licensing laws to subcontractors on federal projects. It said:

"The federal policy, of course, will not be frustrated in those cases where the government does not invoke the provisions of

the Armed Forces Procurement Regulations to determine the responsibility of the subcontractor. But this is wholly aside from the issue here. The burden which may be imposed could in some instances frustrate the express federal policy. It is not the fact that there may not be a conflict concerning subcontractors' responsibility; it is the fact that there may be."

Reasons for Granting the Writ

1. The question presented is important. Over 70 percent of the land in Arizona is federally owned, and there are many public projects. The economy of Arizona is heavily engaged in construction work and in supplying materials and labor for construction projects. The purpose of Arizona's contractor licensing laws is to protect the public against unscrupulous, unqualified or financially irresponsible persons purporting to have the capacity, qualifications and knowledge of a contractor. *See Northen v. Elledge,* 72 Ariz. 166, 232 P.2d 111 (1951); *Westinghouse Electric Corporation v. Rhodes,* 97 Ariz. 81, 397 P.2d 61 (1964); *Miller v. Superior Court in and for County of Pima,* 8 Ariz. App. 420, 446 P.2d 699 (1968). The trial court explicitly found that the system operates on a nondiscriminatory basis for the public protection.

We grant that under the rule of the *Miller* case, Arizona cannot require a license of the general contractors on this public work. But very little of the actual purchase of supplies, of the dealing with merchants of the state, of the hiring of labor is in fact done by the general contractor. Most of it is done by subcontractors. Of the more than 7,000 licensed contractors in Arizona, nearly 5,000 are in the subcontractor group, and on any single large federal project there may be as many as 20 or 30 subcontractors.

The licensing law is the only device Arizona has for insuring that corporate licensees carry workmen's compensation insurance for the benefit of their employees. The licensing system requires a bond for the protection of creditors, a bond by no means adequate for full protection; but it also requires, in the case of corporations, that the corporation qualify to do business in the

state and name an agent for the purpose of accepting service of process.

The federal government makes no effort to insure any qualifications at all for the subcontractor, thus creating a vacuum. Creditors of contractors have no enforceable rights against the United States and acquire no liens on the buildings they create; *see United States v. Munsey Trust Co.*, 332 U.S. 234, 241, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947). Even the Miller Act bond, 40 U.S.C.A. § 270(a) and (d), gives no protection to the ordinary creditors; *Clifford F. MacEvoy Co. v. United States*, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 (1944); *Aetna Casualty & Surety Company v. United States*, 382 F.2d 615 (5th Cir. 1967); and in any case may be inadequate; *see, e.g., Pennsylvania Fire Ins. Co. v. American Airlines, Inc.*, 180 F. Supp. 239 (E.D.N.Y. 1960).

Apart from all this, a base such as Davis-Monthan is for all the vital functions of life inseparable from the City of Tucson itself. There is one water system, one electrical system. Defective plumbing or electrical installations in either community are bound to affect the other.

The matter of course transcends Arizona. States which at the present time have contractor licensing laws of some sort include the following:

Alabama	Michigan
Arizona	Mississippi
California	Nevada
Florida	New Mexico
Hawaii	North Dakota
Louisiana	Tennessee
Maryland	Utah

The capacity of any of them to deal with these problems is cut off by the rule of law announced by Arizona.

2. The *Miller* case by no means requires the result below, and the decision of the Arizona Supreme Court conflicts with numerous

decisions of this Court on federal preemption of state regulatory powers. The decision below cannot be squared with *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 84 S. Ct. 378, 11 L. Ed. 2d 389 (1964), which sustained Florida's regulation of milk prices paid by distributors who in turn resold the milk to military bases.*

See also Penn Dairies v. Milk Control Commission, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943), in which the Court also recognized that those who contract to render services or sell supplies to the federal government are not agencies of the United States, do not perform governmental functions, and are not immune from state regulation.

The simple principle which emerges is that in the absence of direct regulation by the federal government, a contractor remains subject to state regulations. This principle is illustrated in many contexts. *James v. Dravo Contracting Co.,* 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937) (State taxes on a government contractor's gross receipts within the state upheld); *Dow v. United States,* 154 F.2d 707 (10th Cir. 1946) (Subcontract on government project illegal where subcontractor was not properly licensed); *State of Oklahoma v. Willingham,* 143 F. Supp. 445 (E.D. Okla. 1956) (Federal employee must obey state traffic laws although he is traveling in the ordinary course of his employment). *See also, Johnson v. State of Maryland,* 254 U.S. 51, 56, 41 S. Ct. 16, 65 L. Ed. 126 (1920). Under federal statutes such as 41 U.S.C. § 152, applied in the *Miller* case and now covered by 10 U.S.C. § 2305(c), the Government is required to take the bid which is most advantageous to the United States. It has issued

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Polar Ice Cream makes precisely the distinction which we advocate here. In that case the related decision was *Paul v. United States,* 371 U. S. 245, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963), in which the Court held that the State could not regulate the price of milk sold directly to the Government for military consumption and resale at federal commissaries. *Polar Ice Cream* distinguished *Paul* because it involved a state attempt to prescribe prices charged for milk sold directly to the United States.

procurement regulations to evaluate contractors such as 32 C.F.R. §1.903-1, which require the Government to pass upon the suitability of a contractor with which it contracts; and it in fact exercises this power. It was this federal regulation which this Court in the *Miller* case found conflicted with state licensing laws. But none of this has any applicability at all in the subcontractor situation. Under 32 C.F.R. § 1.906(b), the Government *could* qualify subcontractors, but in fact it does not and did not do so here. The Government makes no contract with the subcontractors of its general contractor. As this record abundantly shows, the degree of control, supervision, or qualification by the Government of the subcontractors was exactly zero. The plain fact is that the Government doesn't want to touch those subcontractors with a ten-foot pole to avoid having contractual relations with them.

The decision below holds that the mere possibility that the Government might sometime wish to regulate the choice of a subcontractor, though it did not do so here, necessarily invalidates the state licensing law. This is in flat conflict with the decisions of this Court to the effect that a merely latent federal power does not preempt the field and bar state regulation in the absence of clearly manifested federal intention to that end. The law is that so long as the federal power remains "'dormant and unexercised,'" there is no conflict with state law; *Colorado Anti-Discrim. Com'n v. Continental Air L.*, 372 U.S. 714, 724, 83 S. Ct. 1022, 10 L. Ed. 2d 84 (1963). In order for there to be federal preemption, there must be found such "actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to pre-empt the field." *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141, 83 S.Ct. 1210, 10 L. Ed. 2d 248 (1963) *rehearing denied* 374 U.S. 858, 83 S. Ct. 1861 (1963). This principle is reiterated in *Head v. New Mexico Bd. of Exam. in Optometry,* 374 U.S. 424, 429-32, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963).

A federal statute or regulation supersedes a state statute or

regulation in the same area only where the federal purpose is "clearly manifested." *H. P. Welch Co. v. State of New Hampshire,* 306 U.S. 79, 85, 59 S. Ct. 438, 83 L. Ed. 500 (1939); *Asbell v. Kansas,* 209 U.S. 251, 28 S. Ct. 485, 52 L. Ed. 778 (1907); *Reid v. Colorado,* 187 U.S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902). A federal intent to preempt state regulations cannot be implied unless there is an actual conflict with the law of the state. *Savage v. Jones,* 225 U.S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182 (1912). This is necessarily so, for "[t]o hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. City of Detroit, Mich.,* 362 U.S. 440, 446, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960).

Petitioner carries out an important duty to the people of Arizona by seeing that contractors in the state meet minimum qualifications. He should not be precluded from performing that duty on the mere possibility that a conflict of jurisdiction might someday exist with the federal government. *See State v. Texaco, Inc.,* 14 Wis. 2d 625, 111 N.W.2d 918, 921 (1961).

3. The decision of the court below conflicts with *Dow v. United States,* 154 F.2d 707 (10th Cir. 1946), which announced the opposite rule of law on the precise question of the legality of a subcontractor's licensing requirement.* In that case, in which a subcontractor on federal work was unlicensed in the State of Utah, the 10th Circuit said that for that reason, "[t]he subcontract let to [the subcontractor] was illegal." 154 F.2d at 711.

*This issue was not seriously disputed in the 10th Circuit.

Conclusion

It is respectfully submitted that a petition for a writ of certiorari should issue to review the determination of the Supreme Court of Arizona in this case.

Respectfully submitted,

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September, 1971.

APPENDIX A

THE SUPERIOR COURT OF ARIZONA
PIMA COUNTY

KENNETH G. FLICKINGER, Registrar of Contractors of the State of Arizona, Plaintiff, vs. JAMES H. BENSON COMPANY; JACK BURNS; AMERICAN SANITARY COMPANY; COMPLETE ROOFING COMPANY; ELECTRIC CONSTRUCTION COMPANY; LEE & DANIEL; ROY E. WHITEHEAD; and W. C. ZANDER, Defendants.	No. 115431

FINDINGS OF FACT AND CONCLUSION OF LAW

FINDINGS OF FACT

1. This is an action brought by the Registrar of Contractors to enjoin the defendants from engaging in contracting without a license. As originally brought, the defendants were James H. Benson Company, Jack Burns, American Sanitary Company, Complete Roofing Company, Electric Construction Company, Lee & Daniel, Roy E. Whitehead, and W. C. Zander. The complaint was dismissed at trial as to American Sanitary Company and Roy E. Whitehead, as will be declared in the final judgment; the remainder are hereafter termed the defendants. Each of the defendants is a subcontractor who is engaged in certain work at

the Davis-Monthan Air Base, hereafter referred to as the Base, as is more fully set out in the subsequent paragraphs. Each of them is wholly without any Arizona license to engage in contracting.

2. The problem arises in connection with work at the Base. The Base covers an area of some 11,200 acres bordering Tucson, Arizona, one border of the Base being immediately contiguous to that City. The Base has three primary functions: it is a storage area for used aircraft; it is a training base; and it is an operational military Air Force base.

3. The land making up the Base comes to the federal government from a variety of sources. Some of the land had been acquired by various federal agencies which later were consolidated into the Department of Defense. Some of the land is leased from the State of Arizona. Of the 11,200 acres, the only claim of federal enclave status is for some 485 acres, none of which is involved in this case; and in view of the noninvolvement of that acreage, it is unnecessary to determine any disputed questions as to whether such enclave status exists at all. No acceptances of enclave status under 40 U.S.C. § 255 have been filed with the office of the Governor of Arizona.

4. The Base may be roughly but fairly analogized to a small suburban town adjacent to Tucson, though, because of the age of the Base which dates from approximately 1924, many of the structures are older in appearance than a contemporary Arizona town. Thousands of airplanes are in storage without cover, but in addition there are large storage facilities, 550 homes, service facilities, recreation facilities, golf course, and the other facilities adequate for a resident population of approximately 2,000, and a working population of 10,000. In addition, there are runways, hangars, control towers, and the other structures common to airports. Much of the Base is of a restricted nature, including ammunition dumps.

5. The Base is generally under the charge and administration of the Air Force. When new construction is needed, one method

at least of obtaining it is that which is used in the instant case: that is to say, the Corps of Engineers of the Defense Department takes charge of the construction and has complete responsibility for it until completion, at which time it is turned over to the Air Force.

6. In the instant case, the Air Force desires to acquire five additional structures. To this end, it has executed three contracts. The work covered by these contracts is as follows:

(a) Two Airmen Dormitories, constructed essentially of poured concrete with a lath and plaster exterior, and interior walls constructed of dry wall over steel frame. Each dormitory is designed to house 200 men; and the two dormitories covered under this contract are a part of a larger complex of similar dormitories. The contract includes all plumbing, electricity, carpentry, and other specialty work necessary to produce a completed structure. Each of the defendants is involved in various portions of the construction of these dormitories.

(b) Small aircraft maintenance docks, constructed essentially of concrete and prefabricated steel. The contract includes three structures designed to house 13 relatively small fighter-type aircraft for maintenance purposes. The buildings are preengineered: that is, they are of a relatively uniform type which was engineered before the contract, and consisted in a major portion of preengineered and prefabricated parts. The contract calls for a complete structure, but without the maintenance equipment which will be installed by the Air Force after completion. Each of the defendants is involved in the construction of various portions of these maintenance docks.

(c) An Ammunition Maintenance Shop, Aircraft Corrosion Control Facility, and Weapons Calibration Shelter. The Ammunition Maintenance Shop is a masonry block and concrete building, approximately 80 x 30 feet square. It is designed with a "Blow Off" roof, as it is designed to house and repair explosives. The contract calls for the complete building, and includes or has

included construction by each of the defendants herein. The building is located in a restricted area of the Air Base. The Corrosion Control Facility is essentially a concrete apron measuring 160 x 240 feet, under which is located steam piping. The facility is designed to wash airplanes that have been exposed to corrosive materials prior to their storage. The Weapons Calibration Shelter is a steel building on a concrete apron with a small concrete block workroom in the center. It is designed to accept the nose of a fighter-type aircraft for the purpose of calibrating its guidance and weapons systems. The contract calls for the erection of the entire structure; but all equipment for the calibration and guidance systems will be added by the Air Force after acceptance. Each of the defendants is or has been involved in the construction of the various portions of this structure.

7. The general contractor selected by the government to be in charge of all of these contracts is Forsberg & Gregory, a California corporation. Forsberg & Gregory is licensed in the State of Arizona, and is not a party to this case.

8. Forsberg & Gregory proceeded, in the usual fashion of the construction industry, to sublet portions of the work to subcontractors. There was no review by the government of these subcontractors as a condition of the grant of the contract to Forsberg & Gregory, and the government does not deal directly with these subcontractors, taking up any matters relating to their work with the general contractor. The defendant subcontractors are engaged in such work as plumbing, electrical, roofing, and others, including carpentry and cabinetry. None of these defendants is licensed in the State of Arizona to contract this or any other work in this jurisdiction. The work in which these subcontractors are engaged is of the routine sort common to their trades. In each case, similar buildings might exist in any of the larger cities or towns of Arizona, particularly around airports or universities or large housing developments.

9. All of these structures will use City of Tucson gas, sewage,

and electrical sources and will connect with and be a general part of the same systems which serve all of the inhabitants of the Tucson area, a matter giving the people of that area a legitimate concern with construction on the base.

10. The plaintiff Registrar of Contractors for the State of Arizon is the officer of the State of Arizona charged with the duty of enforcing the contractor licensing laws of the State. In this connection, his office gives examinations to determine qualifications and licenses all units of the construction industry in the State of Arizona. There are more than 7,000 licensees, including all types of general and subcontractors. There are large numbers of licensees in the fields involved in this case. The licenses are given on a nondiscriminatory basis to qualified applicants. Any qualified applicant can obtain a license within a short period of time. The system in no way discriminates against out-of-state contractors or in favor of local contractors. Its sole purpose is to protect the public of the State of Arizona. It serves this purpose by maintaining qualifications, by giving a place at which complaints can be received and processed, and by establishing an address, including in the case of corporations, consent to service of process, under which licensees can be reached if there are claims against them. It requires the posting of small bonds for the benefit of creditors. The office does not originate complaints or inspections, but if the Corps of Enigneers desired to file a complaint against any contractor, it could do so. The principal relation of the office to these defendants would probably arise in case of complaints by suppliers or employees of the defendants.

11. The Sheriff of Pima County has regularly enforced and applied both the civil and the criminal laws of the state of Arizona on the Base. This includes the service and enforcement of warrants of arrest, and service of civil process as well. Working in conjunction with special Base police, he investigates crimes, and maintains order with the consent and cooperation of Base authorities.

12. Much substantial construction is done with federal funds in the State of Arizona. In connection with the expenditures of such funds through the Department of Health, Education and Welfare, it is the practice to bar the applicability of the Arizona tax preference statute (A.R.S. § 34-241) to general contractors, but to apply those laws to subcontractors.

13. Application of the Arizona licensing laws will not burden or in any way handicap or hinder government construction, at least as to work of the type here involved, and will serve a substantial public interest for the people of Arizona in accordance with its policies.

14. The defendants will continue to contract in Arizona without a license unless enjoined by this Court.

CONCLUSIONS OF LAW

15. Each of the defendants is engaged in an act of contracting which constitutes a violation of Title 32, A.R.S. ch. 10, and particularly A.R.S. § 32-1151.

16. This Court has jurisdiction to give an injunction in the circumstances under A.R.S. § 32-1166, but in all the circumstances, concludes instead that it would be harsh and inequitable to give an injunction in these circumstances. Therefore, the defendants will be directed to apply for Arizona licenses and no injunction will issue.

RICHARD N. ROYLSTON
Judge of the Superior Court

March 12, 1970

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELECTRIC CONSTRUCTION COMPANY,

Appellant,

v.

KENNETH G. FLICKINGER, Registrar of Contractors of the State of Arizona,

Appellee.

No. 2 CA-CIV 871

Appeal from the Superior Court of Pima County
Cause No. 115431
Honorable Richard N. Roylston, Judge
Affirmed in part and
Remanded for further proceedings

Lawrence K. Bret Harte — Tucson
Attorney for Appellant

Gary K. Nelson, The Attorney General — Phoenix
Lewis & Roca — Phoenix
by John P. Frank, Special Deputy
Attorneys General

Attorneys for Appellee

KRUCKER, Judge.

This appeal challenges the propriety of injunctive relief (stayed pending appeal) granted to the Registrar of Contractors in proceedings instituted by him to prevent the appellant and other subcontractors from performing certain subcontracts on Davis Monthan Air Force Base without being licensed as contractors in Arizona.

The case was tried to the court, sitting without a jury. Extensive findings of fact and conclusions of law were made and judgment was entered declaring the subcontractors, including appellant, to be subject to the Arizona licensing statutes. An injunction thereafter was issued prohibiting the respective subcontractors from engaging in the business of contracting within the State of Arizona, and, specifically, from conducting any work at Davis Monthan Air Force Base, adjacent to the city limits of Tucson, Arizona, pursuant to their subcontracts. The injunction was stayed for a prescribed period upon condition that an appeal be taken within a specified period of time. Only one of the subcontractors, to wit, Electric Construction Company, has appealed.

The following is a summary of the facts as found by the trial court which we accept as true for lack of attack thereon. Electric Construction Company, a California corporation licensed in California but not in Arizona, was performing work at Davis Monthan[1] pursuant to a subcontract with Forsberg and Gregory, a general contractor, also a California corporation unlicensed in Arizona. Forsberg and Gregory had entered into three separate contracts with the United States Department of the Army Corps of Engineers calling for the construction of airmen's dormitories, an aircraft maintenance dock, an ammunition maintenance shop, an aircraft corrosion control facility, and a weapons calibration shelter.

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[1] Of the 11,200 acres comprising DMAFB, the only claim of federal enclave status is for some 485 acres, which are not involved in this case. Therefore, the Arizona licensing statutes are not vulnerable as an attempt to legislate with regard to transactions occurring within federal enclaves subject to the exclusive jurisdiction of the United States.

The subcontracts were independently entered into by Forsberg and Gregory and there was no requirement of review by the United States as a condition of its awarding the contract to Forsberg and Gregory. There was no direct dealing between the United States and the subcontractors, and anything relating to the performance of their work was taken up with the general contractor. The specialty work to be performed by the subcontractors was of a routine nature and all of the structures which were the subject of the contract would utilize Tucson gas, sewage, and electrical facilities and would connect with and be a general part of the systems which serve the inhabitants of Tucson and its environs.

The Registrar of Contractors, whose duty it is to enforce the contractor licensing laws of the State of Arizona, passes upon license applicants' qualifications to perform various phases of construction work. There are more than 7,000 Arizona licensees, including all types of general and specialty contractors. Qualified applicants, whether resident or non-resident, can obtain licenses in a short period of time. The licensing requirements afford protection to the public in that complaints can be received and processed, service of process can be effected in the event that a claim is asserted, and a contractor's bond is required to be posted.

The trial court also found that much substantial construction is done in Arizona with federal funds and that it is the practice in connection with expenditures through the United States Department of Health, Education and Welfare to bar the applicability of the Arizona tax preference statute, A.R.S. § 34-241, to general contractors but not to subcontractors. Application of the licensing statutes would neither handicap nor unduly burden government construction but, unless enjoined by the court, the subcontractors would continue to contract in Arizona without a license.

The trial court concluded:

* * *

"15. Each of the defendants is engaged in an act of con-

tracting which constitutes a violation of Title 32, A.R.S. ch. 10, and particularly A.R.S. § 32-1151.

16. This Court has jurisdiction to give an injunction in the circumstances under A.R.S. § 32-1166, but in all the circumstances, concludes instead that it would be harsh and inequitable to give an injunction in these circumstances without staying it pending appeal. Therefore, defendants will be directed to apply for Arizona licenses and will meanwhile be enjoined, but the injunction will be stayed pending appeal so that the Court of Appeals may make such disposition of the matter as it sees fit."

Both parties to this litigation admit inability to find a case directly in point, and our independent research has revealed none.

Electric Construction takes the position that the State of Arizona does not have the power to regulate a subcontractor who is in contractual privity with a general contractor having a contract with the United States when the contract is being performed on federal property. It relies on the case of *Leslie Miller, Inc. v. State of Arkansas*, 352 U.S. 187, 77 S. Ct. 257, 1 L. Ed. 2d 231 (1956), which held that a federal contractor was immune from state licensing requirements. The United States Supreme Court stated:

"Mere enumeration of the similar grounds for licensing under the State statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the express federal policy of selecting the lowest responsible bidder." 77 S. Ct. at 258-59.

The United States Supreme Court has held that, unless Congress provides to the contrary, a contractor who erects a government post office does not share any governmental immunity and is

subject to the provisions as to types of material, fire hazards and the like which are covered by the New York City Building Code. *See,* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596 (1940). It has also held that a state may impose a non-discriminatory tax on the activities of a contractor for the federal government. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937); Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466, 54 S.Ct. 469, 78 L.Ed. 918 (1934); Atkinson v. State Tax Commission of Oregon, 303 U.S. 20, 58 S.Ct. 419, 82 L.Ed. 621 (1938); State of Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941); Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946). Other cases which have sustained state regulations in the face of a claim of governmental immunity are: Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964); Railway Mail Ass'n v. Corsi, 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945).

In the case of Public Utilities Commission of State of California v. United States, 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958), the Court indicated that only when there is a clear conflict between the federal policy and the state regulation the latter must yield. *See also,* Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed. 292 (1963). However, the trend is not to extend governmental immunity from state regulation beyond the federal government itself and governmental functions performed by officers and agents of the government. Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261, 63 S.Ct. 671, 87 L.Ed. 748 (1943).

Competitive bidding is the cornerstone of the federal procurement policy. United States v. Warne, 190 F. Supp. 645 (N.D. Cal. 1960). However, *Miller,* supra, denounces only state interference with the federal government's determination of whether a particular bidder is a "responsible bidder."[2]

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[2] 10 U.S.C.A. § 2305 (c) provides:

As to subcontractors such as Electric Construction, however, we find no expression of federal policy with respect to determination of subcontractors' responsibility. When a state attempts to require qualifications in addition to those that the federal government has pronounced sufficient, federal supremacy controls. Johnson v. State of Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920). Such is not the situation here. We hold, therefore, that there is no conflict between our licensing requirements as to subcontractors and the federal statutes and regulations, hence the Registrar of Contractors may lawfully require a subcontractor to obtain a license as a condition precedent to engaging in contracting within the state. *See,* Grand Canyon Airlines, Inc. v Arizona Aviation, Inc., — Ariz.App.—, 469 P.2d 486 (1970).

Electric Construction also contends that the granting of an injunction was "a harsh and inequitable remedy." A.R.S. § 32-1166 provides:

> "In addition to all other remedies, when it appears to the registrar either upon complaint or otherwise, that any person, firm, partnership, corporation, association or other organization, or a combination of any of them that does not hold a state contractor's license in any classification, has engaged in, or is engaging in any act of contracting, practice or transaction which constitutes a violation of this chapter or any rule, regulation or order of the registrar, the registrar may, either through the attorney general or through the county attorney of the county in which the act, practice or transaction is alleged to have been committed, apply to the superior court of that county for an injunction restraining such person from engaging in such act, practice or transaction, or doing any act in furtherance thereof, and, upon a proper showing, a temporary restraining order, a

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"Bids shall be open publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice *to the responsible bidder* whose bid conforms to the invitation and *will be most advantageous to the United States, price and other factors considered.* However, all bids may be rejected if the head of the agency determines that rejection is in the public interest." (Emphasis added.)

preliminary injunction or a permanent injunction shall be granted without bond. . . ."

Thus, we see that an injunction is specifically authorized by statute when it is shown that a person is engaging in an act of contracting without a license. Encylopaedic authority indicates that, under these circumstances, a positive duty is imposed upon the court to grant injunctive relief. 42 Am.Jur.2d Injunctions § 38. However, from the record before us, we are unable to determine whether Electric Construction has complied with the trial court's directive to procure a license. We therefore affirm the judgment as it pertains to the license requirement and remand the case to the trial court for the limited purpose of determining whether injunctive relief is appropriate.

Judgment affirmed.

HERBERT F. KRUCKER, Judge

CONCURRING:

JAMES D. HATHAWAY, Judge

JACK G. MARKS, Superior Court Judge

Note: Chief Judge Lawrence Howard having requested that he be relieved from consideration of this matter, Judge Jack G. Marks was called to sit in his stead and participate in the determination of this decision.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

ELECTRIC CONSTRUCTION CO., INC.,
Appellant,

v.

KENNETH G. FLICKINGER,
Registrar of Contractors of the State of Arizona,
Appellee.

No. 10187-PR

Appeal from the Superior Court of Pima County
Honorable Richard N. Roylston, Judge
Judgment Reversed

Opinion of the Court of Appeals, Division Two
12 Ariz.App. 500, 472 P.2d 111
VACATED

Gary K. Nelson — Phoenix
The Attorney General

Lewis & Roca — Phoenix
by John P. Frank
Special Deputy Attorneys General

Attorneys for Appellee

Lawrence K. Bret Harte — Tucson
Attorney for Appellant

STRUCKMEYER, Chief Justice

The question on this appeal is whether a subcontractor who works on a federal job in Arizona is required to obtain a State contractor's license. The trial court answered this question in the affirmative, and enjoined certain subcontractors who were not licensed in Arizona from performing contracts at Davis Monthan Air Force Base in Tucson, Arizona. The injunctions were stayed pending the appeal of the Electric Construction Co., Inc., one of the subcontractors. We granted review. Opinion of the Court of Appeals, 12 Ariz.App. 500, 472 P.2d 111, vacated. Judgment of the Superior Court reversed.

The Electric Construction Company, a California corporation, is unlicensed in Arizona. It engaged in certain construction at the Davis Monthan Base pursuant to subcontractors with the general contractor, Forsberg and Gregory, also a California corporation unlicensed in Arizona. The jobsites at the Davis Monthan Base admittedly do not have federal enclaves status. 40 U.S.C. § 255.

The U. S. Supreme Court in Miller v. Arkansas, 352 U.S. 187, 77 S.Ct. 257, 1 L.Ed.2d 231, held that a prime contractor, similar to the general contractor in this case, could not be fined because it worked on a federal jobsite in Arkansas and failed to obtain a license from the Arkansas Contractors Licensing Board. The Arkansas licensing law set forth certain factors which the contractors licensing board had to consider in its determination of the qualifications of an applicant for a contractor's license — experience, ability, character, the manner of performance of previous contracts, financial condition, equipment, any fact tending to show ability and willingness to conserve the public health and safety. Arizona has like qualifications and others. A.R.S. § 32-1122.

The Supreme Court was of the opinion that the Arkansas licensing statutes conflicted with the Armed Services Procurement Act of 1947, 10 U.S.C. § 2305(c), providing that awards on advertised bids shall be made to the "lowest bidder" and the Pro-

curement Regulations adopted pursuant to the Act set forth these guiding considerations defining a responsible contractor:

"(a) Is a manufacturer, construction contractor, or regular dealer . . .

(b) Has adequate financial resources, or ability to secure such resources;

(c) Has the necessary experience, organization, and technical qualifications, and has or can acquire the necessary facilities (including probable subcontractor arrangements) to perform the proposed contract;

(d) Is able to comply with the required delivery or performance schedule (taking into consideration all existing business commitments);

(e) Has a satisfactory record of performance, integrity, judgment, and skills; and

(f) Is otherwise qualified and eligible to receive an award under applicable laws and regulations." 1 L.Ed.2d at 232-233.

It has been repeatedly held that regulations such as these have the force of law, *see e.g.,* Public Utilities Com. v. United States, 355 U.S. 534, 2 L.Ed.2d 470, 78 S.Ct. 446; hence, the Court reasoned that the different requirements would give the state board a virtual power of review over the federal determination of responsibility, thus frustrating the "expressed federal policy of selecting the lowest responsible bidder."

Obviously, where the government makes a direct determination of a subcontractor's responsibility, Miller v. Arkansas would be controlling; but where the federal government does not make a direct determination, can the principle of the case extend to a subcontractor to relieve him from complying with the state law? We think so.

No precedent has been cited to us on this precise issue. Perversely, the Supreme Court of the United States has twice reached, but has not answered the analogous question of whether a state can regulate prices between a producer of milk and his distributor where the distributor sells the milk to the United States at a fed-

eral military installation. Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292; Polar Ice Cream & C. Co. v. Andrews, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389. State regulation of milk prices between such a distributor and the United States is, of course, now recognized as a burden on the exercise by the United States of its power to maintain the armed forces and regulate federal territory through the use of procurement regulations. Paul v. United States, supra.

The Armed Services Procurement Regulations provide that determinations concerning prospective subcontractors' responsibility "shall generally be a function performed by the prospective prime contractor." The government may, however, determine the responsibility of subcontractors to the same extent and on the same basis as the prime contractor. The regulations provide:

> "Notwithstanding the general responsibility of a prospective contractor to demonstrate the responsibility of his prospective subcontractors, it may be in the Government's best interest to make a direct determination of the responsibility of one or more prospective subcontractors prior to award of the prime contract. * * * The determination of responsibility of a proposed subcontractor by the Government shall be based on the same factors as are applicable in a determination of responsibility of a prospective prime contractor." Armed Service Procurement Regulations, 32 CFR § 1.906(b) (1970).

The regulation recognizes that subcontractors are first the responsibility of the prime contractor, but in the end are but another arm of and, hence, the responsibility of the federal government.

The rationale for the decision in Miller v. Arkansas was expressed in a quote from Johnson v. Maryland, 254 U.S. 51, 65 L.Ed. 126, 41 S.Ct. 16, that if instrumentalities of the United States must desist from performance of their duties until they satisfy a state officer of their competence, qualifications are added to those which the federal government has pronounced sufficient. Arizona's qualifications would result in the identical conflict which was found to frustrate the federal policy of selecting the lowest

responsible bidder whenever the government makes a direct determination of the responsibility of a prospective subcontractor. The federal policy, of course, will not be frustrated in those cases where the government does not invoke the provisions of the Armed Service Procurement Regulations to determine the responsibility of the subcontractor. But this is wholly aside from the issue here. The burden which may be imposed could in some instances frustrate the express federal policy. It is not the fact that there may not be a conflict concerning subcontractors' responsibility; it is the fact that there may be.

We hold Arizona's contractor's licensing act has no application to subcontractors engaged in the performance of duties for the benefit of the United States.

Judgment reversed.

FRED C. STRUCKMEYER, JR.
Chief Justice

JACK D. H. HAYS
Vice Chief Justice

JESSE A. UDALL
Justice

LORNA E. LOCKWOOD
Justice

JAMES DUKE CAMERON
Justice

APPENDIX D

SUPREME COURT
STATE OF ARIZONA
Phoenix
85007
June 23, 1971

ELECTRIC CONSTRUCTION CO., INC., Appellant, v. KENNETH G. FLICKINGER, Registrar of Contractors of the State of Arizona, Appellee.	No. 10187-PR (Supreme Court) No. 2 CA-CIV 871 (Court of Appeals) No. 115431 (Pima County)

The following action was taken by the Supreme Court of the State of Arizona on June 22, 1971, in regard to the above- entitled cause:

"ORDERED: Motion for Rehearing — DENIED."

Mandate issued this date.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

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